SYAWAL ENTERPRISE SDN. BHD. & ANOR.

v.

DAYADIRI SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C4797 OF 1985]
11 MAY 1990

CIVIL PROCEDURE: *Application to set aside or strike out writ - Order 18 r. 19 Rules of the High Court - Inherent jurisdiction of the Court - Lack of authority of the solicitors to act - Burden of proof that the suit had been instituted with proper authority.*

COMPANY LAW: *Lack of authority of solicitors to cause the writ to issue on behalf of the 1st plaintiff company - Burden of proof that suit had been instituted with proper authority - Minority shareholder claiming to have full control over affairs of company - Minority shareholder claiming that all the other shares are held on trust by nominees - Whether Articles of Association empowered minority shareholder to institute legal proceedings - Whether there was proper and valid ratification - Whether ratification made within reasonable time.*

This was the defendant's application to strike out or set aside the writ under O. 18 r. 19 of the Rules of the High Court 1980 or under the inherent jurisdiction of the Court. The defendant contended that the 1st plaintiff'solicitors had no proper authority to cause the writ to issue on behalf of the 1st plaintiff.

On the defendant's application, one Jamaluddin Awalludin (JA) was adduced as co-plaintiff, JA was chairman and managing director of the 1st plaintiff company. He stated that one Soo Seng Chuan, (SSC), a minority shareholder had no authority to institute legal action against the defendant and neither did any solicitor have any instruction to commence any action against the defendant. The minority shareholder, SCC, stated that all the other shares in the company were held in trust for him by his nominees and that for all intents and purposes, he had full control over the affairs of the company. The articles of association of the 1st plaintiff provides that the board of directors shall conduct the business of the company. The articles of association were not invoked to delegate power to SSC. SSC's action in instituting this suit was purportedly ratified by the board of directors well over 3 years from the date of unauthorised issue of the writ. The status of the directors/shareholders was itself the subject of a challenge in another suit.

Held:

[1] The lack of authority of the solicitors to act can be challenged at any stage of the proceedings and the burden of proving that the suit had been instituted with proper authority rests on the plaintiff company.

[2] None of the articles of association of the company had been invoked to give the minority shareholder (SSC) any of the powers he claims to have or have reserved to himself as alleged beneficial owner of all the shares.

[3] A beneficiary of shares in a company, registered in the name of another person as trustee, has no rights in such company and any relations which the trustee has with the beneficiary are matters with which such company has nothing whatsoever to do.

[4] The minority shareholder (SSC) has failed to prove that he had the authority to instruct solicitors to institute the suit.

[5] The ratification by the board of directors/shareholders was not made within a reasonable time.

[6] The ratification which was being challenged in another suit could not be regarded as validly/properly made by the board of directors/shareholders.

[Defendant's application granted. All orders made under or pursuant to the writ and pursuant to applications thereunder set aside.]

Cases referred to:
Simmons v. Liberal Opinion Ltd. [1911] 1 KB 966
Re L.Y. Swee & Co. Ltd. [1968] 2 MLJ 104
Chin Kok Kwong Const. Sdn. Bhd. v. Sunrise Towers Sdn. Bhd. [1986] 2 MLJ 41
United Investment & Finance Ltd. v. Tee Chin Yong & Ors. [1967] 1 MLJ 31
Sundram Properties Sdn. Bhd. v. Cyril Wettasinghe & Ors. [1987] CLJ (Rep) 988
Danish Mercantile Co. Ltd. v. Beaumont [1951] 1 Ch 680

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

Other source referred to:
Bowstead on Agency, 14th Edn., r. 2(c) at p. 51

For the plaintiffs - C.K. Yeoh; M/s. Chooi & Co.
For the defendants - S. Kanawagi; M/s. Khana & Co.

JUDGMENT

VC George J:

The writ herein was caused to be issued on 19 August 1985 at the instance of Messrs Chooi & Co., Advocates & Solicitors of Kuala Lumpur holding themselves out as solicitors of the plaintiffs.

Judgment in default of defence was entered against the defendant. An attempt to have that default judgment set aside failed. However by an order of the Court made on 6 January 1987 stay of execution of the judgment was given on terms to enable the issue of whether or not the judgment had thereafter been satisfied to be tried. The defendant was in that same order of 6 January 1987 given leave to apply to add Jamaludin bin Awalludin alias Muhyuddin as a co-plaintiff.

On 22 January 1987 the defendant took out the summons-in-chambers encl. (33) in the Court file seeking various orders and in particular by prayer 4 sought to have the writ set aside or struck off pursuant to O. 18 r. 19 and/or under the inherent jurisdiction of the Court. In the meantime on 21 January 1987 Jamaluddin was duly added as a plaintiff and is referred to hereafter as the 2nd plaintiff.

The application was at the Court's instance adjourned to and was heard in open Court. It was supported by the affidavit encl. (32) of Zaimah binti Mahiadin a director of the defendant company and by the affidavit of the 2nd plaintiff encl. (31).

Counsel for the defendant with the Court's consent dealt with and submitted only on the said prayer 4 and restricted his submission in respect thereof to only one ground which was that at all relevant times Messrs. Chooi and Co., had no proper authority to cause the writ to issue on behalf of the 1st plaintiff.

In para. 15 of the affidavit encl. (32) Zaimah says:

> 15. I am advised and verily believe that this action should not have been commenced against the defendant as in the first place, the plaintiff's solicitors did not have the authority to commence this action on behalf of the plaintiff, which is a corporate entity and without the authority of the board of directors.

The 2nd plaintiff in his affidavit encl. (31) says *inter alia* that he is the chairman and managing director of the 1st plaintiff and that he had not been aware of the institution of the suit until 14 February 1986 when at the office of Messrs Chooi & Co., he learnt of this. He claims in paras. 11 and 12 of his affidavit:

> 11. I also informed the plaintiff's solicitors that as they had commenced this action on the instructions of the minority shareholders/directors, then the plaintiff's solicitor should withdraw this action matter.
>
> 12. I wish to categorically state that at all material times either in the past or in the present, the minority shareholders had no authority to institute this legal action against the defendant and neither did any solicitors have any instruction to commence any action against the defendant.

The lack of authority of the solicitors to act can be challenged at any stage of the proceedings - See *Simmons v. Liberal Opinion Ltd.* [1911] 1 KB 966 followed in *Re L.Y. Swee & Co. Ltd.* [1968] 2 MLJ 104 at 107 and in *Chin Kok Kwong Const. Sdn. Bhd. v. Sunrise Towers Sdn. Bhd.* [1986] 2 MLJ 41 at 42. The challenge having been made the burden of proving that the suit had been instituted with proper authority rests on the plaintiff company. See *United Investment & Finance Ltd. v. Tee Chin Yong & Ors.* [1967] 1 MLJ 31 at 35.

En. Yeoh Chong Keng the partner in M/s. Chooi & Co., solicitors for the plaintiffs who had the conduct of the matter by his affidavit encl. (83) in the Court file explained how M/s. Chooi & Co., came to be instructed to cause the writ to issue. At para. 4 of the affidavit he says:

> 4. I wish to state that my firm was retained to act in this suit for the 1st plaintiff by Soo Seng Chuan. I was and still am the Counsel who was briefed. I still take instructions from Soo Seng Chuan in relation to the conduct of this case.

A former shareholder of the 1st plaintiff sets out in paras. 2 and 3 of her affidavit encl. (82) in the Court file what she appeared to consider was the basis on which Soo Seng Chuan purported to authoritatively instruct solicitors on behalf of the plaintiff:

> 2. I was formerly a shareholder of the plaintiff. In this capacity I was the nominee of Soo Seng Chuan who is my brother-in-law. I know as a fact that all the shares held by the other shareholders in the plaintiff were subscribed by Soo Seng Chuan including those which were then held by the 2nd plaintiff. Likewise all the appointments to the board were on the instructions of Soo Seng Chuan.
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> 3. Soo Seng Chuan manages the business of the 1st plaintiff and the other directors are aware of this fact because he is the one that funds the operation of the business.

Soo Seng Chuan confirms the position by his affidavit encl. (84) which makes interesting reading - Paras. 3 to 9 are reproduced here:

> 3. I am to state that I am the registered and beneficial owner of 65,000 shares out of 200,001 shares in the 1st plaintiff. The balance of the shares are registered in the names of:
>
> (a) Samsudin bin Mustapa - 122,501 shares
>
> (b) Basri bin Ab. Talib - 12,500 shares
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> However, both Samsudin bin Mustapa and Basri bin Ab. Talib hold the said shares as my nominee and on trust for me. The shares certificates in the 1st plaintiff are now produced and shown to me marked as Exhibit "SSC8".
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> 4. Prior to the said shares being registered in the names of Samsudin bin Mustapa (Samsudin) and Basri bin Ab Talib (Basri), the said shares were held by the 2nd plaintiff. The 2nd plaintiff was divested of the said shares as follows:
>
> (a) 25 August 1986 - 25,000 shares were transferred to Samsudin (12,500) and Basri (12,500)
>
> (b) 27 January 1987 - 10,001 shares were transferred to Samsudin.
>
> I was able to effect the transfer of the said shares because the 2nd plaintiff held the said shares as a nominee and trustee for me.
>
> 5. I incorporated the 1st plaintiff with the object of supplying food and ration to the various ministries in the Government of Malaysia and for the sake of business and economic expediency I recruited amongst others, the 2nd plaintiff as a shareholder and director in the 1st plaintiff.
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> 6. From the outset, the 2nd plaintiff agreed to be my nominee on the board of directors and as a shareholder in the 1st plaintiff in return for monetary compensation otherwise I would not have subscribed to the shares in his name nor caused his appointment as a director.
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> 7. Even though I caused the appointment of the 2nd plaintiff to the post of chairman cum managing director of the 1st plaintiff after the death of his father, it was largely ceremonial for the purpose of business efficacy and expediency bearing in mind the nature of the 1st plaintiff's business.
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> 8. I was and still am the main driving force of the 1st plaintiff. I retained control and authority over the affairs of the 1st plaintiff and never at anytime then or now divested myself of them. I managed the affairs of the 1st plaintiff although I had not been appointed as such because of my position as owner and/or beneficial owner of all the shares in the 1st plaintiff. All the directors including the 2nd plaintiff were my nominees and they acted only on my instructions. In this context, I had full control of the 1st plaintiff.
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> 9. Needless to say, it was also in this context that I retained Messrs. Chooi & Co. to act in this suit for the 1st plaintiff.

In plain words and without the use of euphemisms the incorporation of the 1st plaintiff company with the majority of the shares shown to be held by Malays was obviously to misrepresent to various Government agencies that the 1st plaintiff is what is described as a Bumiputra company. There is evidence in the affidavits filed that many and substantial contracts with Government agencies had been won by the company no doubt holding itself out as a Bumiputra company which suggests to me that the planned misrepresentation had in fact been perpetuated from time to time and may even have been fraudulent misrepresentation.

It seems to be that if there is any truth in what is alleged by Soo Seng Chuan in those paragraphs of his affidavit that I have just read the 2nd plaintiff and Samsudin and Basri referred to were all *particeps criminis* as it were in the misrepresentation. And the partners to this planned abuse of the Companies Act and of Government policies having fallen out among themselves now seek the aid of the Court to resolve their differences. I think that doing so is an abuse of the process. And if indeed the whole suit including the intended counterclaim are abuses of the process they and each of them, and all the petitions and pleas of each of the parties made thereunder should not be given any countenance by the Court. They should not be entertained.

However at this stage I do not intend to pronounce on that aspect of the matter. The parties should be heard on it and perhaps the Court should be assisted by *amicus curiae* before any ruling is made on the rights of the parties herein to have their problems adjudicated by a Court of Law. Perhaps the parties hereto should be required to show cause why the Court should not strike out the claim and the counterclaim.

Now having camouflaged the whole operation by the incorporation of the plaintiff company with the substantial portion if not all of the issued shares which Soo Seng Chuan says he owns beneficially issued in the name of Malays and having appointed a board consisting of Malay directors to use the language used by Soo in his affidavit "for ceremonial purposes only" Soo thinks he is entitled to manage the affairs of the 1st plaintiff. He says as much in para. 8 of his affidavit which has been reproduced hereabove.

However the application of the law and practice pertaining to companies on the facts of this case suggests otherwise. The articles of association of the 1st plaintiff provide by Article 73 that the business of the company shall be managed by the directors. Delegation of the powers of the directors may be made by power of attorney (see Article 76) or to a committee duly appointed (see Article 86). The directors may appoint a managing director. His powers as such managing director will be limited to the powers specifically conferred on him (see Article 93). The position is identical to that referred to in *United Investment & Finance Ltd. v. Tee Chin Yong & Ors.* - (*supra* - see p. 35 of the report).

It seems obvious that in respect of Soo Seng Chuan none of the said articles or any other articles of association of the company had been invoked to give him any of the powers he claims to have or have reserved to himself as alleged beneficial owner of all the shares. The rights or lack of rights of a beneficial owner of shares registered in the name of somebody else was considered by Peh Swee Chin J in *Sundram Properties Sdn. Bhd. v. Cyril Wettasinghe & Ors.* [1987] CLJ (Rep) 988 where at p. 991 he reiterated:

> ... that a beneficiary of shares in a company, registered in the name of another person as trustee, has no rights in such company and any relations which the trustee has with the beneficiary are matters with which such company has nothing whatsoever to do.

There has been a failure to prove that Soo Seng Chin had the authority to instruct solicitors to institute the suit. The effect is to make the proceedings a nullity in the sense that the action is not properly constituted. See *Danish Mercantile Co. Ltd. v. Beaumont* [1951] 1 Ch 680.

That same case is also authority for the proposition that the act of the solicitors causing the writ to issue without proper authority can be ratified by the plaintiff company. Ratification however must be effected within a reasonable time - see *Bowstead on Agency*, 14th Edn., r. 2(c) at p. 51.

In the instant case the challenge to the authority of the solicitors to cause the writ to issue in the name of the plaintiff was made by the summons encl. (33) which is dated 22 January 1988. What is held out to be ratification is the resolution of the board of directors and of the shareholders of the company on 21 March 1988 and 21 September 1989 respectively, over a year and over 2 years respectively from the date of the challenge to the authority of the solicitors and well over 3 years and 4 years respectively from the date of the unauthorised issue of the writ. It seems to me that the company has failed the reasonable time test. Worse, the status and shareholding of the individuals held out as board of directors and shareholders of the plaintiff company when the said resolutions were passed are the subject of a challenge in Kuala Lumpur High Court Civil Suit No. 22-32-87 some of the cause papers of which have been exhibited in encl. (80) herein.

In the face of that unresolved challenge I fail to see how the Court can accept that there has been due ratification.

The writ has to be and is struck off. It follows that all orders made under or pursuant to the writ and pursuant to applications thereunder have to be and are set aside.

I will hear arguments in respect of costs on a date to be fixed by the Senior Assistant Registrar.

Also found at [1990] 2 CLJ 297